

Article 9 and Security Interests In Accounts, Contract Rights and Chattel Paper

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INTRODUCTION

Article 9 of the Uniform Commercial Code deals with security interests in personal property. It would supersede the present Ohio statutes on chattel mortgages, conditional sales, factor's liens, crop mortgages, railroad equipment mortgages, trust receipts, and assignment of accounts receivable;¹ and it would affect present Ohio practices in connection with consignments, bailment leases, and field warehousing. It would also affect certain aspects of the present Ohio Sales Act, Bills of Lading Act, Warehouse Receipts Act, Bulk Sales Act, Small Loan Act, and Retail Installment Sales Act.² The adoption by Ohio of Article 9 (officially cited as "Uniform Commercial Code—Secured Transactions") obviously would make major changes in existing Ohio law.

This paper will compare in some detail Article 9 with present Ohio law relating to security interests in three subclassifications of intangible personal property (*i. e.*, accounts, contract rights, and chattel paper). A detailed discussion of security interests in the other two subclassifications of intangible personal property (*i. e.*, documents of title and instruments) and in four subclassifications of tangible personal property (*i. e.*, goods, including inventory, equipment, consumer goods, and farm products) will appear in a later issue of this Journal. Some general comments on the over-all scheme of Article 9 are, however, a necessary preliminary to the detailed discussion.

Many readers will have already noticed in the preceding paragraphs that Article 9 will introduce new words into their legal vocabularies. A deliberate attempt has been made to label fresh

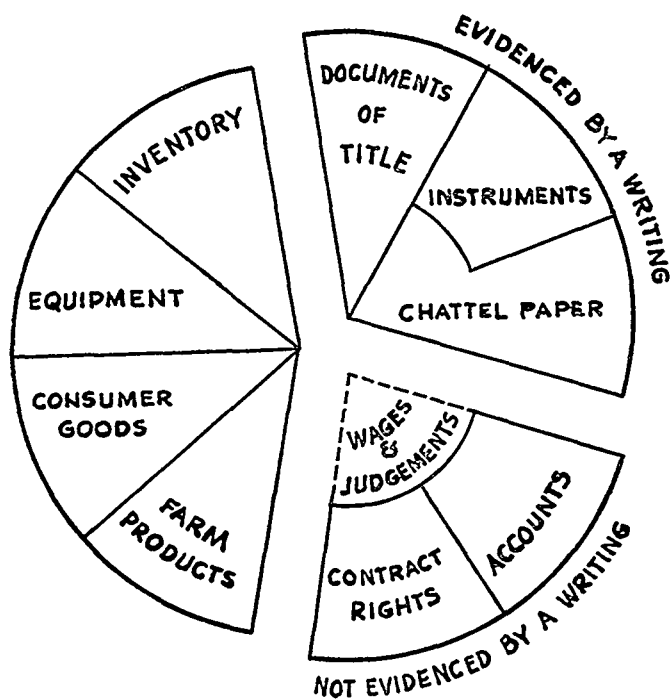
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¹ Respectively, OHIO GEN. CODE § 8560 et seq.; § 8563 et seq.; § 8364-1 et seq.; § 8567-1 & -2; § 8623-75; § 8568; and § 8509-3 et seq. For discussion of common law merchant factor's liens see Cameron, *Factor's Liens in Ohio*, XXXIII OHIO BAR 361, 362 (1950).

² Respectively, OHIO GEN. CODE § 8381 et seq.; § 8993-1 et seq.; § 8457 et seq.; § 11102 et seq.; § 6346-12 et seq.; and § 6346-15. Article 6 of the Uniform Commercial Code, entitled "Bulk Transfers," would, if adopted, supersede the present bulk sales act.

concepts with terminology unknown to the present legal dictionaries. It is intended thereby to require Article 9 to be interpreted and applied by reference to the Rules of Construction for the whole Code stated in Sec. 1-102.³ The scrap heap of judicial definitions collected in such compendia as "Words and Phrases" is intended to be made irrelevant.

Illustration "A" shows the classifications of personal property used in Article 9. The major distinction is between (a) goods, which



(a) GOODS (b) INTANGIBLE PROPERTY
CLASSIFICATION OF PERSONAL PROPERTY USED IN ARTICLE 9
ILLUSTRATION "A"

"... includes all things which are movable ..." except money and intangibles,⁴ and (b) the two classes of intangible personal property. The first class of intangibles includes those which are customarily evidenced by a writing and transferred by delivery of the writing (documents of title, instruments and chattel paper);⁵ the second class includes those customarily not evidenced by a writing (ac-

³ These rules direct that the Uniform Commercial Code be liberally construed in order to promote a simple, flexible and uniform commercial law.

⁴ U.C.C. § 9-105 (1) (f).

⁵ Definitions of the subclassifications comprising this first class will be found in U.C.C. § 9-105 (b), (e) and (g).

counts and contract rights).⁶ Compensation due to an employee and judgments, both of which fit within the broad description of the second class of intangibles, are specifically excluded from that class by Sec. 9-106.

MAJOR POLICIES OF ARTICLE 9

There are nine subclassifications of personal property recognized by Article 9. The *substantive* rights of certain parties will sometimes vary with the subclassification of personal property involved, but the *formal* requirements of Article 9 for the attachment and perfection of any security interest in any property are uniform. Fine distinctions between chattel mortgages and conditional sales will no longer be of concern,⁷ and generally, in connection with security interests, the location of title will be immaterial. The lender or vendor who desires a security interest will prepare the same simple "security agreement" for any transaction covered by Article 9. He will need neither a lawyer to warn him of intricate formal snares nor a notary to perform superfluous ceremonies. If he wishes to use any of the old forms he may, but all he really will require is a writing which contains a reasonable description of the personal property in which a security interest is claimed, the signatures of the debtor and of the secured party, and their respective addresses.⁸ The recorder will not maintain several separate indices all of which must be searched in checking title to personal property.⁹

⁶ Definitions of the subclassifications comprising this second class will be found in U.C.C. § 9-106.

⁷ When a chattel mortgagee under present Ohio law attempts after default to gain possession of the mortgaged property he may be met with the claim that the security transaction was really a conditional sale and that therefore he is not entitled to possession until after a tender back of part of the purchase price. See, e.g., *Bellish v. C.I.T. Corp.*, 142 Ohio St. 36 (1943) (4 to 2 opinion on whether the form of a certain transaction as a matter of law made it a conditional sale instead of a chattel mortgage). This is not a recent problem. Compare comment of the senior author of this paper when a junior in law school: "The various forms of sale of chattels on credit all have a common purpose—easier payment for the buyer with sufficient security for the seller....Despite this simple underlying purpose the law regarding such contracts has grown complex. This is shown by attempts to distinguish between a conditional sale and a chattel mortgage." 36 HARV. L. REV. 740 (1922).

⁸ An oral agreement is sufficient if the secured party has possession of the collateral. U.C.C. § 9-203(1)(a).

⁹ On an informal basis this has already been accomplished in Cuyahoga County where the Recorder maintains a single consolidated card index for chattel mortgages (filed or recorded), conditional sales, factors, liens, notices of assignment of accounts receivable, attested accounts, and Industrial Commission liens under OHIO GEN. CODE § 1465-74a. He also maintains three separate indices, duplicating entries in the consolidated index, for recorded chattel mortgages, factor's liens and notices of assignment of accounts re-

This is the first major policy of Article 9—to make the formal requirements of obtaining all security interests in personalty simple and uniform so that legal consequences will not turn on distinctions based on form or title.

A second major policy is to facilitate the creation of secured interests in personal property. Article 9 approves the after-acquired property clause¹⁰ and the future advances clause.¹¹ It adopts notice filing as opposed to requiring a detailed description of each item of collateral.¹² It eliminates the need for a secured party to police the operations of the debtor as required by *Benedict v. Ratner*, 268 U. S. 353 (1935), and the subsequent cases which voided security arrangements if the borrower had much control over the collateral.¹³ These four steps make possible the creation of a so-called "floating lien"—a security interest in a single *res* which consists of the whole inventory as it may exist from time to time. The legal unit to be pledged then becomes "stock in trade," "work in process," or "book account"—not the underlying component items in inventory at a given moment or the specific accounts receivable then on the books. By the use of field warehousing¹⁴ a shifting stock of inventory can be securely pledged in Ohio today, and under the present Ohio statute a floating lien on certain future accounts is possible; so Article 9 will not introduce this form of secured financing into wholly new fields. But it will simplify and make more secure the lien on many types of short-lived collateral, and thereby, of course, reduce the cost to borrowers of many forms of secured credit.¹⁵

ceivable. Other personal property liens may be found in the separate indices to unemployment compensation liens [OHIO GEN. CODE § 1345-4(a) (4)] and Federal tax liens (INT. REV. CODE § 3670 et seq. and OHIO GEN. CODE § 2757-1).

¹⁰ U.C.C. § 9-204(3).

¹¹ U.C.C. § 9-204(5).

¹² U.C.C. § 9-402.

¹³ U.C.C. § 9-205. For a good review of the *Benedict v. Ratner* doctrine see *Note—Accounts Receivable Financing—Limitations upon Control By Borrower*, 24 N.Y.U.L.Q. REV. 598 (1949).

¹⁴ To establish a field warehouse, the debtor leases a portion of his premises to a warehouse company. That company takes possession on the leased premises of some part of the debtor's inventory and issues warehouse receipts which can be used as bank collateral. Typically the field warehouse company merely hires as its supervisor of the inventory an employee of the debtor. See Friedman, *Field Warehousing*, 42 COL. L. REV. 991 (1942); Birnbaum, *Form and Substance in Field Warehousing*, 13 LAW & CONTEMP. PROB. 579 (1948).

¹⁵ After the Ohio statute was revised to permit floating liens on accounts receivable, one borrowing arrangement known to the authors was reset to eliminate the paper work incidental to a non-floating lien on short-lived

It is here that the major economic struggle occurred in the deliberations of the American Law Institute and is likely to recur in the Ohio Legislature. Spokesmen for the unsecured creditors (chiefly the credit men and commercial lawyers, who represent the trade creditors selling on open account) are well accustomed to mortgaged real estate. They still look askance at pledged accounts and field warehoused inventory, and they freely predict dire consequences from floating liens to which all inventory, all receivables, and even some of the cash might be subject. Some suggest that manufacturers, wholesalers, and other sellers might have to adopt cash, C.O.D., or sight draft credit policies if their customers quite generally began creating floating liens on their current assets in favor of banks and commercial credit companies.¹⁶ The answer of the supporters of Article 9 is that "Hostility to secured credit does not prevent such credit from being extended, but serves only to make it more expensive."¹⁷ They point to the economic waste involved in the expense of operating complicated credit procedures and in the higher interest which must be charged to offset the occasional loss of security when a slip occurs in those complicated procedures.

The Ohio State Bar Association has endorsed all of Article 9 except the filing provisions.¹⁸ County seat rather than state capital

accounts. Although the interest rate was reduced from 6% to 4½%, the lender reports a higher net profit. The borrower reports an even greater dollar saving on clerical cost than on reduced interest.

¹⁶ See discussion of economic policy issues by one of the draftsmen of Article 9 in Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588 (1949) particularly at p. 613 ff.

¹⁷ Birnbaum, *Article 9 — A Restatement and Revision of Chattel Security*, 1952 WIS. L. REV. 348, 353 (1952).

¹⁸ The Committee on Banking and Commercial Law in a report to the May 15, 1952, Meeting of the Council of Delegates, stated: "The committee recommends that after it is adopted by New York State and two or three other states, it should be adopted by the Ohio Legislature with the following exceptions:

1. The Metzenbaum Act, relating to installment sales, should be retained, and if there are any provisions of the Uniform Commercial Code in conflict with it, they should not be adopted.
2. The present provisions of the Ohio Code with respect to filing in order to protect a security interest should be retained in principle, and any provisions of the Uniform Commercial Code in substantial conflict therewith should not be adopted. (There may be an exception made in the case of consumer goods sold at retail.)
3. The committee reserves judgment on whether Article 6, relating to Bulk Sales, should be adopted in place of the present Bulk Sales Act. It will have a recommendation to make later on this subject."

This report was held over at the request of the chairman and at the November 1, 1952, Meeting of the Council of Delegates a revised report was approved which recommended "that it be passed by the Ohio legislature after New York

filing is favored by the Association. The field warehousing interests in Ohio, although they will still have collateral control if not legal security services to sell, are, of course, vigorously opposed to Article 9.¹⁹ The credit men and the collection bar have indicated they will oppose it. The authors of the present paper are members both of the American Law Institute and of the Ohio State Bar Association. Their endorsement of the Association's position is therefore perhaps doubly suspect. They submit, however, that a careful comparison of the impact of Article 9 on the present Ohio Law relating to security interests in intangible property will show (a) few material changes except in connection with chattel paper and (b) quite good reasons for adopting most of these changes.

ACCOUNTS AND CONTRACT RIGHTS

Let us first compare the present Ohio law relating to security interests in accounts and contract rights²⁰ with the relevant provisions of Article 9. The 1951 revision of the Ohio Assignment of Accounts Receivable Act was primarily intended to overrule *Wells v. Place*, 95 Fed. Supp. 474 (E.D. Ohio 1950), 58 Ohio L.Abs. 582, which had construed the 1941 Ohio Assignment of Accounts Receivable Act to mean that general creditors could not avoid an assignment in which the assignee and the subsequently bankrupt assignor had failed to comply with the recording provisions of that Act.²¹ Combined with the 1950 amendment of Section 60 of the Bankruptcy Act,²² the *Wells v. Place* holding permitted an assignee who had neglected to record his assignment under the former Ohio statute nevertheless to prevail over the trustee of his bankrupt assignor — either under Section 60 or under Section 70 (e). Thus

and at least one or two of the larger commercial states have adopted it. Your committee has some reservation as to the adoption of parts relating to Bulk Sales and some of the provisions for recording that may be contrary to the policy adopted by the Ohio legislature, but it will, if you approve, make its recommendation to the legislature with respect thereto at the appropriate time."

¹⁹ Based on recent interviews with persons engaged in Ohio field warehousing operations, the authors estimate that there are currently about 250 field warehouses in Ohio containing about \$20,000,000.00 of material.

²⁰ The Ohio Assignment of Accounts Receivable Statute as revised in 1951 is briefly discussed in Folkerth, *Accounts Receivable Legislation*, 12 OHIO STATE L. J. 333 (1952).

²¹ A "clearly erroneous interpretation." Folkerth, *supra*, 335.

²² Section 60 was substantially rewritten and the bankruptcy trustee was reduced to the position of a lien creditor (from his former position of a bona fide purchaser) in testing whether transfers by the bankrupt could be voided as preferences. See Sell, *Preferential Transfers for Security Under Section 60 of The Bankruptcy Act*, 12 U. OF PITT. L. REV. 173 (1951) for a complete history of Section 60; and see Kupfer, *The Recent Amendment to the Preference Section of the Bankruptcy Act*, 22 N.Y. STATE BAR ASSN. BULL. 329 (1950) for a particularly good concise summary of same.

the recordation required by the 1941 Ohio Act became irrelevant in bankruptcy and was of significance only in the rare instances where a dishonest assignor assigned the same accounts receivable to more than one assignee.

The Ohio Banker's Association, which had sponsored the 1941 Ohio statute, employed a draftsman and directed him to make a thorough study of the statutes of other states and, in particular, of the Uniform Commercial Code (then in tentative draft). The Committee assigned to work with the draftsman adopted the position of the Commercial Code whenever a choice of positions seemed fairly even. As a result, the 1951 version of the Ohio Assignment of Accounts Receivable Act brought Ohio law in this area into quite substantial conformity with what is proposed by the Uniform Commercial Code. We shall compare the two statutes in respect to: Transactions Covered, Filing Provisions, Rights Given to Assignee, and Procedure upon Default.

TRANSACTIONS COVERED

The security interests in accounts receivable covered by the present Ohio statute are substantially the same as those within the scope of Article 9. Noteworthy differences can best be shown by reviewing the eleven tests which a given transaction must meet before it comes within the scope of the present Ohio statute.²³ The first seven of these tests look to the nature of the property involved, and the last four tests look to the nature of the transaction involved.

- (1) The Ohio statute limits its definition of an account receivable to a "right to the payment of money." The Code omits the final two words in its definition of account and contract right.²⁴ Exchange transactions which fall outside the scope of the Ohio statute would therefore be covered by the Code, and there is no reason why such non-monetary obligations should not be transferable as security.
- (2) In parallel language, the Ohio statute and the Code limit the accounts within their scope to those "for goods sold or leased or for services rendered."²⁵ Thus

²³ Transactions beyond the scope of the statute would be under the Ohio common law, and it is an open question whether between two successive assignees the first in time of assignment or the first to notify the debtor would prevail. Compare *Gamble v. Carlisle*, 3 Ohio N.P. 279, 282, 6 Ohio Dec. (N.P.) 48 (Sup. Ct. of Cin. 1896) and Ohio Annotations to RESTATEMENT, CONTRACTS § 173 (1933) with *General Excavator Co. v. Judkins*, 128 Ohio St. 160, 166, 190 N.E. 389, 392 (1934). See summary of Ohio case law in Hamilton, *Assignments of Accounts Receivable Under the Chandler Act*, 14 Ohio Ops. 168 (1939).

²⁴ OHIO GEN. CODE § 8509-3 (1) and U.C.C. § 9-306 (3).

²⁵ OHIO GEN. CODE § 8509-3 (1) and U.C.C. § 9-106.

both exclude accounts arising from the sale or lease of real estate, from cash loans and cash deposits, from the maturity of insurance policies, etc. The intention in each instance was to limit the statute to commercial current assets financing.

- (3) The Ohio statute includes in its definition of an account receivable "both an existing right to immediate or future payment and a right to payment which may arise under an existing contract." The former is the definition of an "account" and the latter is substantially the definition of a "contract right" under the Code.²⁶ Neither the Ohio statute nor the Code includes in its concept of presently assignable rights a right which may arise under a contract which has yet to be made.
- (4) Both the Ohio statute and the Code exclude accounts receivable which prior to assignment have been sued upon and a judgment obtained.²⁷ One should note that judgments obtained subsequent to assignment become "proceeds" of the account and belong to the assignee.²⁸
- (5) Both the Ohio statute and the Code exclude accounts evidenced by a negotiable instrument,²⁹ for transfer of such accounts falls under the law of negotiable instruments.
- (6) The Code excludes accounts evidenced by chattel paper. The Ohio statute excludes accounts evidenced by "a duly filed or recorded instrument . . . of chattel mortgage or conditional sale."³⁰ Thus accounts represented by unfiled and unrecorded chattel mortgages or conditional sales contracts can be assigned under Ohio law as accounts receivable. This is discussed below in comparing the treatment of chattel paper under the Code with present Ohio law.
- (7) Both the Code and the Ohio statute adopt the conflict of laws rule that the location of the assignor determines the applicable law. In the case of an assignor with multi-state operations, both look to the state where the assignor keeps his primary bookkeeping record for the particular account.³¹ There are five possible determinants of the state law to govern an account receivable assignment: the locations of (1) the debtor, of (2) the creditor-assignor or of (3) the

²⁶ OHIO GEN. CODE § 8509-3 (1) and U.C.C. § 9-106.

²⁷ OHIO GEN. CODE § 8509-3 (b) (1) and U.C.C. § 9-106. Since the intent is to recognize the extinguishment of the account by merger into judgment, no doubt only prior personal judgments are excluded. A judgment *in rem* or *quasi in rem* does not extinguish the unpaid balance of the account; it is merely satisfaction of part of the account. See *Saunders v. King* § 69 Ohio App. 313, 37 N.E. 2d 92 (1941).

²⁸ OHIO GEN. CODE § 8509-3 (a) and 6 (5) and U.C.C. § 9-306 (1).

²⁹ OHIO GEN. CODE § 8509-3 (b) (2) and U.C.C. § 9-106.

³⁰ OHIO GEN. CODE § 8509-3 (b) (3) and U.C.C. § 9-106.

³¹ OHIO GEN. CODE § 8509-4 and U.C.C. § 9-103 (1).

assignee and the location where the contract of assignment is (4) made or (5) to be performed. It is the assignor's creditors who should be able to locate any public recordings related to the assignment, and so only the location of the assignor is a feasible determinant.³² Neither the Ohio statute nor the Code permits the parties to contract for a different applicable law,³³ since it is the third party creditors whose rights are to be protected.

- (8) Both the Code and the Ohio statute exclude reassignments by assignees in the financing business.³⁴ This permits a bank to reassign participating interests in a large loan without filing. Unlike primary assignments, reassignments are usually to several assignees and the reassigning bank may have a different group of participants for each loan. Thus the filing techniques used for primary assignments are inappropriate.
- (9) The Ohio statute excludes "transfers by operation of law." The Code by covering only "any transaction . . . intended to create a security interest in personal property" and "any financing sale of accounts" excludes transfers by law as well as gifts, transfers of a contract right to an assignee who is also to do the performance under the contract, etc.³⁵ This is an improvement on the Ohio statute which invalidates for failure to file some non-commercial assignments which the parties might never expect to be covered.
- (10) Both the Code and the Ohio statute exclude certain accounts the assignment of which is subject to special federal or state law.³⁶ Thus neither statute affects the Ohio automobile lien system of notation on the certificate of title. The assignment of claims against the federal government, regulated by the Federal Assignment of Claims Act, need not now be filed in Ohio, but, because of a difference in wording, filing is required under the Code. The federal statute permits assignment only to certain lenders and also provides for notice to contracting and disbursing of-

³² See Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROBS. 27, 33 ff. (1951).

³³ U.C.C. § 1-105 (6) as limited by U.C.C. § 1-102 (3) (b). The Ohio statute does not make any provision for choice of law by the parties. See Everett, *Securing Security*, 16 LAW & CONTEMP. PROB. 49 (1951).

³⁴ OHIO GEN. CODE § 8509-4 and U.C.C. § 9-302 (1) (f).

³⁵ OHIO GEN. CODE § 8509-3 (3) and U.C.C. § 9-102 (1) (a) and (b).

³⁶ OHIO GEN. CODE § 8509-3 (1) (b) and U.C.C. 59-104 (a) (exclusion from coverage) and -302 (2) (a) (exclusion from filing provisions). Nautical financing is excluded under U.C.C. § 9-104 (a) because of the Ship Mortgage Act, 1920, 46 U.S.C. § 911 ff. Under U.C.C. § 9-302 (2) (a) aeronautical financing is excluded because of the airplane lien provisions of the Civil Aeronautics Act, 49 U.S.C. § 523, and railroad equipment financing is excluded because of the recordation provisions of 49 U.S.C. § 20c. All three types of financing are excluded under OHIO GEN. CODE § 8509-3 (1) (b).

ficers and to sureties on bonds.³⁷ There seems to be little point in requiring by state law a further notice to the public. Wage claims are excluded by both statutes, under Ohio law because there are applicable state statutes and under the Code by express provision.³⁸

- (11) The Code excludes "a transfer of accounts as part of a sale of the business out of which they arose," while the Ohio statute recognizes this exclusion only if the requirements of the Bulk Sales Law are met.³⁹ The Code's provision is probably the better one. If the Bulk Sales Law is applicable and not followed, adequate remedies are provided by that law. If the Bulk Sales Law is not applicable to the entire sale, there is no reason to single the accounts receivable out for special treatment.

There are three additional exclusions from the Code's filing requirements not provided by the Ohio statute: (1) assignments which do not represent a significant part of the assignor's outstanding accounts or contract rights, (2) assignments for collection only, and (3) the further assignment of a perfected security interest.⁴⁰ The first of these exclusions intends to exclude the casual or isolated transaction; it was not incorporated into the Ohio statute because it was felt that the invalidation of such a transaction was better than litigation to determine whether a given assignment was "a significant part" of the book account. The second exclusion is unnecessary in that an assignee for collection must, of course, return the proceeds collected on the account to the assignor. The third exclusion largely duplicates the exclusion discussed under (8) above.

In summary, the Code and the present Ohio statute are almost coterminous in their coverage of accounts receivable transactions. The only difference between the two which should not unquestionably yield to the very important consideration of achieving uniformity among the various states is the coverage of claims against the federal government. It is known that all the principal advisors on the drafting of Article 9 did not realize that the exclusions of Section 9-104(a) and -302 (2) (a) were drawn so narrowly as to leave these claims covered. The Ohio Legislature might well invite testimony on this problem by federal contracting officers, bankers, and interstate uniformity zealots.

FILING PROVISIONS

The basic technique of Article 9 is "notice filing" which requires public filing of a simple notice to indicate that a specified per-

³⁷ 31 U.S.C. § 203.

³⁸ OHIO GEN. CODE § 6346-12 *et seq.* and U.C.C. § 9-106.

³⁹ OHIO GEN. CODE § 8509-4 and U.C.C. § 9-104 (f).

⁴⁰ U.C.C. § 9-302 (1) (e) and (2).

son may have a security interest in some of the property of another specified person.⁴¹ The public records, then, do not as under the present chattel mortgage act show particular items of property subject to a security interest. Notice filing was first introduced into accounts receivable legislation by the 1941 Ohio statute, and seventeen other states subsequently adopted the same principle in their accounts receivable statutes.⁴² The filing provisions of the Uniform Commercial Code were patterned after these state statutes and the Uniform Trust Receipts Act. The 1951 Ohio statute, in turn, was tailored from the Code. The forms and procedure provided for filing under the Code consequently are quite similar to those now in use in Ohio for accounts receivable assignments.

The forms which are set out in the Ohio statute contain the same minimal information required by the Code.⁴³ The theory of notice filing is that the public notice should merely alert the stranger to his need for further credit information about the assignor; and both the Code and the Ohio statute provide procedures under which the assignor may obtain certain information from the assignee which will enable the assignor to provide verified credit data to his present and prospective creditors. The Ohio statute awards the assignor \$500.00 from the assignee if the assignee, after payment of the debt, in bad faith fails to deliver a notice of cancellation ten days after demand. The Code awards actual damages incurred by the assignor plus a penalty of \$100.00.⁴⁴ These provisions are designed to prevent a lender from taking a dog-in-the-manger position when the borrower wishes to do his financing elsewhere. The Code also requires the assignee to supply within two weeks, upon request of the assignor, a statement of unpaid indebtedness and to verify a list of assigned accounts.⁴⁵ Thus, the Code, without being unduly onerous on the assignee, ⁴⁶ meets not only

⁴¹ It is sometimes claimed that notice filing makes available to competitors a list of the secured party's customers. See Dunham, *supra*, p. 612. A company which has solicited every borrower revealed by accounts receivable or factor's lien notices filed in Cuyahoga County has informed the authors that in no instance has it been successful in persuading the borrower to shift. The explanation suggested by this unsuccessful solicitor is that the public filing is usually a final step in an elaborate and carefully negotiated transaction, and the borrower by then is either too tied or too tired to consider alternatives no matter how attractive.

⁴² Ala., Ariz., Calif., Colo., Fla., Ga., Idaho, Kan., La., Mo., Neb., N.C., Okla., S.C., Texas, Utah and Wash. In addition, Penn. has adopted the Uniform Commercial Code including its filing provisions, effective July, 1953.

⁴³ OHIO GEN. CODE § 8509-3 (7) and U.C.C. § 9-402 (1).

⁴⁴ OHIO GEN. CODE § 8509-6a and U.C.C. § 9-404 (1).

⁴⁵ U.C.C. § 9-208.

⁴⁶ U.C.C. § 9-208 requires the assignee to supply such a statement only once each six months without charge. For additional statements, the assignee may charge up to \$10.00 each.

the dog-in-the-manger problem but also requires disclosure before full payment of the debt.

An important difference in the procedures is that the Ohio statute now requires the filing to be made *prior to or contemporaneously* with the assignment.⁴⁷ The purpose of this requirement is to eliminate the practice of holding security documents in the safe until the debtor becomes shaky and then recording. General creditors are given an earlier warning of liens under this rule, and, if, through inadvertence, filing has been overlooked and an assignment taken, the situation can, of course, be remedied (except for preference problems which may arise by reason of the later perfection of the security interest) by filing a notice and then taking another assignment. The Code permits filing subsequent to assignment, relying for prompt filing on the fear of the assignee that various intervening events may worsen the security of an unperfected lien,⁴⁸ and there is considerable logic to this approach of making the filing time a matter of credit risk for the assignee.

One feature of the filing provisions of the Code which the authors would reject is the Code's provision for state capital filing of account receivable liens (except for county filing when the accounts involved arise from the sale of farm products by a farmer).⁴⁹ There are some advantages to a single central file. A set of rules is not needed to determine the county in which to file.⁵⁰ Credit information services can check one file in Columbus instead of the files in 88 county seats, and the assignee can be certain he has filed in the proper spot.

Ohio's state capital, however, is neither the financial nor the industrial center of the state. A telephone call from either Cleveland or Cincinnati to a Columbus central file would cost one dollar even with quite prompt service by the filing office, and use of the mail would mean three or four days from inquiry to reply. Some reduction in total consumer lien filings (which are to be made in

⁴⁷ OHIO GEN. CODE § 8509-5 (1).

⁴⁸ U.C.C. § 9-303 (1) (a).

⁴⁹ U.C.C. § 9-401 (a) and (b). For other special treatment of transactions with farmers see Hunt and Coates, *The Impact of the Secured Transactions Article on Commercial Practices with Respect to Agricultural Financing*, 16 LAW & CONTEMP. PROB. 165 (1951).

⁵⁰ See present Ohio rules for selecting proper county in: OHIO GEN. CODE § 8509-5 (6) (county of principal place of business of assignor of accounts receivable, or, if no such place in Ohio, then county where assignor keeps ledger sheet); OHIO GEN. CODE § 8364-3 (for factor's lien, county of corporate borrower's principal place of business, or, if no such place in Ohio, then county where merchandise is located); and OHIO GEN. CODE §§ 8561 and 8563 (county of residence of chattel mortgagor or of conditional vendee, or, if no such place in Ohio, then county where property is situated.)

the county of the debtor's residence) is expected under the Code,⁵¹ but the central file of liens on accounts, inventory and equipment might get so large as to become unmanageable unless broken down geographically at least in part, particularly if the new Code provisions increased the popularity of liens on accounts and inventory as a financing device.⁵² Several state-wide records are currently divided into (a) Cuyahoga County, (b) Hamilton County and (c) the rest of the state, for reasons of geographic and numerical convenience in administration,⁵³ and, so far as the theory of central filing is concerned, there might as well be 88 county files as three central files.

The Ohio State Bar Association has declined to approve the filing provisions of the Code,⁵⁴ and the Uniform Trust Receipts Act was never passed in Ohio in part because it provides for central filing.⁵⁵ In preparing the 1951 revision of the Ohio Assignment of Accounts Receivable Act, the merits of central filing were not weighed because of informed advice that the state legislature, numerically dominated by representatives of the smaller counties, would not pass an act with such provisions. In existing accounts receivable legislation, the more important commercial states have adopted county filing,⁵⁶ and in 1951 the California legislature rejected a proposal to substitute state capital filing for county filing under the California statute.

The draftsmen of Article 9 offer a compromise on the central

⁵¹ Because a purchase money security interest in consumer goods (not part of real estate and not an automobile) is perfected without filing against all but a buyer who does not know of the security interest, who gives value, and who buys for his own personal, family or household purposes. U.C.C. §§ 9-302(1) (d) and -307(2).

⁵² In Cuyahoga County during an average month the following will be filed with the Recorder: 7,700 chattel mortgages, 10 conditional sales contracts, 15 notices of assignment of accounts receivable, and 1 or 2 factor's liens. Ohio is unique in the large number of consumer goods liens filed, Kripke, *The "Secured Transactions" Provisions of the Uniform Commercial Code*, 35 VA. L. REV. 577, 612 (1949), and a substantial number of the 7,700 chattel mortgages, being consumer goods liens, would not under the Code be filed in Columbus. But if only 10% of them from all over Ohio would go into the central file, that file would soon become unwieldy, particularly because of the duration of filing provisions of the Code.

⁵³ E.g., form 915 of the Tax Commission, Analysis of a Trust or Life Estate Income, is filed in Cleveland, Columbus, or Cincinnati.

⁵⁴ See note 18, *supra*.

⁵⁵ OHIO GEN. CODE § 8568 is the Ohio statute covering trust receipts.

⁵⁶ County filing has been adopted by Ala., Calif., Ga., La., Mich., Neb., N.C., Okla., S.C., and Texas. Central filing has been adopted by Ariz., Colo., Fla., Idaho, Kan., Mo., Utah and Wash. As this paper is being written, a bill for central filing is being considered by the Vermont legislature, and bills for county filing are being considered by the legislatures of Iowa and Wyoming.

filing issue by suggesting as an optional provision that supplementary county filing be required if all the assignors' places of business are in a single county.⁵⁷ Such duplicate filing would not seem to be a very happy solution, but Pennsylvania abandoned its traditional county filing of chattel mortgages and conditional sales agreements to adopt the Code with this optional feature (which Pennsylvania previously had adopted for trust receipts). Pennsylvania also abandoned bookmarking in favor of notice filing for assignments of accounts receivable.

Another disputed feature of the Code's filing scheme is its provision for the duration of the effectiveness of a filing. Article 9 provides that a filed document remains effective until (a) a time of termination specified in the filed document; (b) the creditor files a termination notice; or (c) the filing officer at any time after the maturity date stated in the notice or after five years from the initial filing notifies the secured party that the effectiveness of the filed notice will lapse unless a continuation notice is filed within 60 days.⁵⁸ The authors feel that the burden of keeping the filing active should be on the assignee and that the mechanics for clearing dead notices from the files should not require the filing officer to analyze filed documents or to exercise discretion. The three year duration of filing, subject to cancellation or extension, now used in Ohio for chattel lien filings⁵⁹ suggests a fixed time period which has proved workable.

The Ohio proponents of the Code should prepare the necessary supplementary sections to provide county filing and a fixed duration of effectiveness of filing, or, perhaps, should encourage the draftsmen of the Code to prepare such provisions for the various states which may desire them. The need for interstate uniformity on procedural matters is not great; the important goal of the Code should be uniformity in substantive law.

RIGHTS OF ASSIGNEE

The Ohio statute grants the transferee of an account receivable the status of "protected" assignee upon completion of a written assignment to him of the account subsequent to or concurrent with his filing of a notice of assignment. The Code refers to "perfection" of a security interest in accounts when the notice is filed or when an assignment for value is made of accounts in which the assignor has rights, whichever is later.⁶⁰

The Ohio statute provides "an assignment not so protected shall

⁵⁷ Bracketed words at end of U.C.C. § 9, 401 (1) (a).

⁵⁸ U.C.C. § 9-403 (2) and (3).

⁵⁹ OHIO GEN. CODE § 8565 (chattel mtg.); 8569-1 (Condit. Sales); § 8364-5 (factor's lien); and § 8509-5(a) (a/c receivable).

⁶⁰ OHIO GEN. CODE § 8509-5 (1), and U.C.C. §§ 9-303 (1) (a) and -204.

be valid between assignor and assignee but shall be wholly void as against all other persons." The Code gives the unperfected security interest somewhat greater rights in that persons who have knowledge of the unperfected security interest cannot prevail over it even if they perfect their own interest or obtain a lien.⁶¹ Although "notice of a fact" is carefully defined by the Code so as to exclude some of the broader concepts of constructive knowledge,⁶² at this point the Code establishes a subjective test to benefit a laggard filer and elsewhere it permits delayed filing.⁶³ The more strict rule of the Ohio statute would avoid difficult questions to litigate relating to subjective knowledge, but it might occasionally produce quite inequitable results. The reasons for choosing either policy seem less weighty than the desirability of tampering as little as possible with the substantive sections of the Code.

Under the Ohio statute, an assignee who is "protected" still takes the account subject to certain liens which might be on the account and to certain rights of tracing proceedings to which the assignor might have been subject.⁶⁴ In Ohio such liens on an account might include: an effective attachment by a third party of the sum owing to the assignor if the attachment preceded the assignment of the account; or, unpaid franchise and personal property taxes of a corporation which assigned the account at the time of its dissolution.⁶⁵ There is no Code provision which expressly recognizes these superior claims but it is perhaps implicit.⁶⁶

The rights of the assignee who "protects" under the Ohio statute are substantially the same as those of the assignee who "perfects" under the Code. There are five classifications of persons against whom such rights might be asserted:

- (1) The assignor
- (2) The assignor's creditors
- (3) The assignor's transferees
- (4) The Trustee in Bankruptcy of the assignor
- (5) The assignor's debtors

The principal differences between the Code and the Ohio statute relate not to the unpaid balance of the assigned account but as to "proceeds" collected by the assignor.⁶⁷

(1) *The assignor.* Between assignor and assignee, subject only to restrictions in any contract between them, the assignee under

⁶¹ OHIO GEN. CODE § 8509-6(1) and U.C.C. § 9-301 (1) (b).

⁶² U.C.C. § 1-201(25), (26) and (27).

⁶³ See discussion of this under Filing Provisions, p.—.

⁶⁴ OHIO GEN. CODE § 8509-6(a) and (3).

⁶⁵ OHIO GEN. CODE § 5506.

⁶⁶ One would expect to find such a provision in U.C.C. § 9-303(2), and perhaps § 9-303 (2) (e) or § 9-201 implies it.

⁶⁷ Defined at OHIO GEN. CODE § 85-9-3(9) and at U.C.C. § 9-306(3).

either the Code or the Ohio statute has superior rights to the assigned accounts and to any proceeds.⁶⁸

(2) *The assignor's creditors.* Against the assignor's creditors, the assignee under either the Code or the Ohio statute prevails as to the unpaid account balance.⁶⁹ This is true even if the assignee has permitted the assignor to collect the proceeds of the assigned accounts and to use them freely in the assignor's business. The contrary rule of *Benedict v. Ratner*⁷⁰ has been reversed by both the Ohio statute and the Code.⁷¹ Lenders, of course, may still police the collection practices of borrowers, but the extent and the nature of the policing will be a matter of credit policy rather than of legal necessity. The wisdom of abolishing the *Benedict v. Ratner* rule has been debated,⁷² but where notice filing is required most arguments against such abolition are weakened.⁷³ In any event, Ohio in 1941 abolished the rule in part in connection with account receivable assignments and in 1951 wholly abolished it in that connection. The Code in this regard is not an innovation.

Under the Ohio statute the assignee also has a right superior to the assignor's general creditors in any proceeds collected but not yet turned over to the assignee. Such proceeds, however, are not regarded as trust funds unless the assignee contracts with the assignor in such fashion as to impose a fiduciary status upon the assignor and further requires an appropriate segregation of the collected funds. Under the Code a similar fiduciary status may be imposed by contract or a security interest by filed notice may be attached to the proceeds. Even without such arrangements, under the Code a secured party with a perfected security interest in the accounts has a claim preferred over the general creditors to the assignor's cash and bank accounts equal to the cash proceeds collected by the assignor during the immediately preceding ten days

⁶⁸ OHIO GEN. CODE § 8509-6(5) and U.C.C. § 9-201. In *Brod v. Cincinnati Time Recorder*, 82 Ohio App. 26, 77 N.E. 2d 293 (1947) the assignor was allowed to retain as against the assignee payments made to the assignor by a bonding company to cover defalcations of the assignor's collection agent prior to the assignment without warranty. Query: whether such payments are "proceeds" under either the Ohio statute or the Code.

⁶⁹ OHIO GEN. CODE § 8509-6(5) and U.C.C. § 9-201.

⁷⁰ See note 13, *supra*.

⁷¹ OHIO GEN. CODE § 8509-6b and U.C.C. § 9-205.

⁷² Kripke, *The Modernization of Commercial Security Under the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 183 (1951) (leads to competition between lenders "upon the basis of a competitive debasement of proper collateral control practices".) But compare Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 36 ff. (1951).

⁷³ Cf. *Second Nt. Bank of Houston v. Phillips*, 189 F. 2d 115 (5th Cir. 1951). See Kripke, *The "Secured Transactions" Provisions of the Uniform Commercial Code*, 35 VA. L. REV. 577, 591-2 (1949).

minus any portion of such proceeds already paid to the assignee.⁷⁴ The Code here seems to be unduly generous to the assignee. To the extent that the assignee dilutes his contractual control over the proceeds, to that extent he should reduce the priority of his claim to the proceeds over the claims of the general creditors. The Code, however, is less generous to the non-policing assignee than was the 1941 Ohio statute which, like the present statutes of many states, made the assignor a trustee of the proceeds by statute and limited the right of the assignee only by his ability to trace.

(3) *The assignor's transferees.* Where two assignees of the same account have each duly filed the statutory notice, under both the Code and the Ohio statute, priority as to the unpaid balance of the account is given to the first who filed a notice.⁷⁵ This permits a revolving assignment arrangement whereby a line of credit is kept open against successive assignments of accounts; a fixed total of security is maintained by regular assignment of fresh accounts to replace those which have been paid. A fixed total loan is maintained since the assignee lends back against the new accounts the moneys he collected on the old ones. Once the assignee has checked the filed notices and determined that his is the earliest notice on file, he need not again check the public records as he takes each subsequent assignment. No one subsequently filing a notice can prevail even if the later one to file has obtained an earlier written assignment. In such revolving arrangements, the assignee must be sure, however, that the new assignments precede the relending of the collections; otherwise the assignment would be for antecedent consideration and possibly a preference.⁷⁶

When present assignment of future accounts is possible, such a revolving arrangement can become a floating lien.⁷⁷ Thus the Ohio statute permits the present assignment of future accounts which may arise under existing contracts.⁷⁸ A manufacturer who has con-

⁷⁴ OHIO GEN. CODE § 8509-6(5) and U.C.C. § 9-306.

⁷⁵ OHIO GEN. CODE § 8509-6(4) and U.C.C. § 9-312.

⁷⁶ For a more detailed description of a revolving assignment of accounts receivable see Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588, 596 (1949).

⁷⁷ The term is derived from the English "floating charge". The Companies Act, 1929, 19 and 20 GEO. V, c. 23 § 266 permits a term loan to be secured by a lien on existing and after-acquired inventory. The borrower agrees to maintain a minimum ratio of inventory value to loan balance, but may otherwise buy for and sell from inventory without restriction. See Dunham, *supra*, p. 595, and discussion of this "sophisticated concept" by Magruder, J., in *Manchester Nt. Bank v. Roche*, 186 F. 2d 827 (1st Cir. 1951).

⁷⁸ The definition in OHIO GEN. CODE § 8509-3(1) of an account receivable includes "a right to payment which may arise under an existing contract" and the design of the statute makes such an account receivable presently assignable. To avoid the bankruptcy preference problem, the assignment papers should be drafted so that the transaction will be analyzed as a contempo-

tracts ("franchises") with his dealers may thus pledge to the bank as security for a term loan his future accounts receivable from specified dealers. He need not assign each invoice as goods are shipped nor turn over payments as received.⁷⁹ The bank for credit control would probably want a regular report on dropped dealers, current balances, etc., but the law does not require the lender to police his loan. Upon default, the bank's lien would apply to such balances as were due from the specified dealers at the time of foreclosure. The Code, which does not limit the present assignment of accounts only to those which may arise under existing contracts, broadens considerably the possible uses of such floating liens. U.C.C. Secs. 9-204 (2) (c) and (d) and 9-108 (2) make it possible for a department store, for example, to give a bank a floating lien on its book accounts even though its accounts arise from individual sales to customers, who have no contract with the store at the time the floating lien is established. The desirability of such enlarged use of floating liens has already been discussed.

If the assignor transfers the proceeds to someone other than a good faith purchaser for value of goods or the holder in due course of a negotiable instrument, the assignee protected under the Ohio statute may recover the proceeds — but a special short statute of limitations requires him to undertake such recovery within one year after the proceeds are paid by or for the account of debtor.⁸⁰ Under the Code, unless insolvency proceedings have been instituted against the assignor, the perfected security interest continues in identifiable proceeds, but if the proceeds are transferred by the assignor in the ordinary course of business, the assignee will in most cases be unable to capture the proceeds.⁸¹ Thus, except for the accelerated statute of limitations, the Code and the Ohio statute grant substantially the same rights to the assignee against transferees of the proceeds of assigned accounts.

(4) *The assignor's Bankruptcy Trustee.* Under the revised Bankruptcy Act Section 60, the trustee in bankruptcy has the same status as a lien creditor.⁸² He, therefore, prevails over an unpro-

reaneous exchange of the initial loan for an immediate assignment of the claims which may arise. If the assignment is analyzed as not occurring until the claim actually does arise, the transfer is for an antecedent debt. U.C.C. § 9-108 (2) expressly states the first analysis, which is implicit in the Ohio statute. For the danger of establishing a floating lien where the law does not clearly permit its use see *In re Standard Const. Co. Inc.*, 92 Fed. Supp. 838 (D.C. N.H. 1950), *aff'd sub nom.* *Manchester Nat. Bank v. Roche*, 186 F. 2d 827 (1st Cir. 1951).

⁷⁹ The retention of collections by the assignor without thereby impairing the security interest of the assignee is made possible by the abolition of the rule of *Benedict v. Ratner*. See discussion *infra* at p. 87.

⁸⁰ OHIO Gen. CODE § 8509-6(5).

⁸¹ U.C.C. §§ 9-306 (4), -307, -308 and -309.

⁸² See note 22, *supra*.

tected assignee under the Ohio statute or an unperfected security interest under the Code but is subordinated in the event of protection or perfection. The difference between the Code and the Ohio statute is the Code's special 10-day rule as to proceeds compared with tracing under the Ohio statute.⁸³

(5) *The assignor's debtors.* There are no major differences between the Code and the Ohio statute in the rights of the account debtor whose account has been assigned. Under both, the assignee is subject to defenses and claims of the account debtor arising out of the contract between him and the assignor and also the defenses and claims which accrue before the account debtor receives notice that his debt has been assigned.⁸⁴ The Ohio statute makes explicit the right of the account debtor to assert "any set-off or defense arising from a breach of warranty not discovered until the account debtor has received . . . (the statutory notice) . . . to the extent of the balance of the account receivable unpaid when the breach is discovered," and the same rule is adopted by the Code. This is an important right for credit purchasers of complex mechanical items (automobiles, television sets or refrigerators) or services the quality of which cannot be judged until sometime after purchase (roof repairs, furnace rebuilding, etc.). Non-payment is often the purchaser's only practicable means of compelling service and repair, and the assignee is often in a better position to investigate a dealer in advance and to compel him to treat the customer fairly. The Code recognizes yet another aspect of this problem by invalidating agreements by a consumer not to assert claims and defenses arising out of his purchase.⁸⁵

The Code also invalidates prohibitions of assignment by account debtors. This would reverse the probable Ohio rule as gleaned from a nineteenth century case, but would conform to a current shift in general legal thought and current commercial practice.⁸⁶ The account debtor, despite notice of assignment, may under the Code continue to make his payments to his original creditor until supplied with reasonable proof of the assignee's rights.⁸⁷ Another innova-

⁸³ See note 74, *supra*.

⁸⁴ OHIO GEN. CODE § 8509-6c and U.C.C. §§ 9-317, 318 (1) (a) and (b). The Ohio statute requires that the notice be written and "state the amount claimed to be due the protected assignee and identify the transactions from which the assigned account receivable arose." But the account debtor who learns of the assignment in some less formal way than the statutory notice cannot subject the assignee to any and all payments to or settlements with the assignor made thereafter, for the statute provides that the assignee shall be subject only to good faith dealings of the account debtor prior to formal notice.

⁸⁵ U.C.C. § 9-206 (1). See discussion on p. 86.

⁸⁶ Compare U.C.C. § 9-318 (4) and official comments thereto with *United States Life Ins. Co. v. Hessberg*, 27 Ohio St. 393 (1875) and *Allhussen v. Caristo Const. Co.*, 303 N.Y. 446, 103 N.E. 2d 891 (1952).

⁸⁷ U.C.C. § 9-318 (4).

tion in the Code is provision for the amendment of a contract after notice has been given of the assignment of money to become due under it. The contract may be modified to the extent not completed by the assignor and the debtor-to-be if the changes are "made in good faith and in accordance with reasonable commercial standards." The assignee acquires corresponding rights under the modified contract and, if the assignment so provides, may regard the modification as a breach by the assignor.⁸⁸ This will be a very useful rule if the device of floating liens becomes more common, and the assignee who wishes to avoid it can always so contract with the debtor-to-be at the time of the assignment.

PROCEDURE UPON DEFAULT

The Ohio statute does not expressly cover the rights of the assignor upon default by the assignee. The Code concisely spells out an appropriate procedure. When the assignor defaults, the assignee under the Code may notify the account debtors to pay the assignee directly even if previously they have been paying the assignor and have not known of the assignment.⁸⁹ If the assignment was with partial or full recourse, the assignee must make such collections "in a commercially reasonable manner" and may deduct his reasonable expenses of collection. Whether the assignor is entitled to a surplus or liable for a deficit if there was no express agreement upon the point depends upon whether the assignment was to secure a loan or was actually a sale.⁹⁰

CHATTEL PAPER

Chattel paper is defined in U.C.C. Sec. 9-105 (1) (b) as "a security agreement or lease of a type which is in ordinary course of business transferred by delivery with appropriate indorsement or assignment. When a transaction is evidenced both by chattel paper and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper." The intention is to include chattel mortgages, conditional sales agreements, bailment leases and any other writings which (a) create liens on personal property and (b) are ordinarily transferred by indorsement and delivery. The final sentence of the definition makes the law of chattel paper assignments rather than the law of negotiable instruments applicable to the indorsee of a promissory note which arose from a transaction where a chattel mortgage or conditional sales agreement was also executed. (Note indication of this on Illustration "A"). U.C.C. § 9-206 voids an agreement by a buyer of consumer goods not to assert against assignees defenses and claims

⁸⁸ U.C.C. § 9-318 (2).

⁸⁹ U.C.C. § 9-502 (1).

⁹⁰ U.C.C. § 9-502 (2).

arising out of the sale, even if asserted by the holder in due course of a negotiable note.⁹¹

These limitations of the traditional status of a holder in due course reflect a current trend in case law to deny that status, on almost any convenient rationalization, to finance companies or banks regularly discounting a dealer's consumer chattel paper.⁹² In Ohio, for example, a finance company was held liable to a house owner, in an action based on alleged conspiracy to defraud, when the court concluded that the finance company should have known that its assignor as consideration for the making of the assigned notes was doing an inferior job of house siding application. In denying the finance company the status of a holder in due course the Ohio court quoted with approval the headnote of an Arkansas case:

A finance company which had prepared and delivered to an automobile dealer forms of notes and conditional sales contracts bearing a printed form of assignment to itself, and which, on the day of the sale of a car by the dealer, took an assignment of the sales contract and purchaser's note, is to be regarded as a party to the transaction against whom the defense of fraud and misrepresentation may be made rather than as an innocent purchaser for value before maturity.⁹³

The rule suggested in the above head note is more strict than Article 9 of the Code, for that Article does not take the position that a bank or finance company regularly discounting a dealer's paper can never for any purpose be a holder in due course of that paper.⁹⁴ In its treatment of holders of notes secured by chattel paper arising from sales of consumer goods, then, Article 9 would supersede a few old Ohio cases which gave such holders the normal rights of indorsees of negotiable paper⁹⁵ but would take a middle of the road

⁹¹ If the holder in due course of the note does not attempt to foreclose under the security agreement or to levy on the collateral, he is not automatically subject to the defenses. U.C.C. § 9-206(1). He could, for example, get a money judgment and attach the debtor's wages.

⁹² See 152 A.L.R. 1397 (1944).

⁹³ *Davis v. Commercial Credit Corp.*, 87 Ohio App. 311, 318 (Stark Cty. 1950).

⁹⁴ U.C.C. § 3-302, which defines "holder in due course" in the Article covering Commercial Paper, requires not only good faith but "observance of the reasonable commercial standards of any business in which the holder may be engaged" and lack of notice "of any defense against . . . it." U.C.C. § 1-201 (25) (c) states that a person has notice of a fact when "from all the facts and circumstances known to him at the time in question he has reason to know it exists". So a bank or finance company regularly discounting paper of an unsatisfactory dealer might become subject to defenses wholly apart from Article 9.

⁹⁵ See, e.g. *Springfield Loan Co. v. Nat. Guarantee & Finance Co.*, 30 Ohio L. Abs. 582; (1939); *Dennis v. Rotter*, 43 Ohio App. 330 (1932); and *Gates v. Merchant's Banking & Storage Co.*, 11 Ohio C.D. 721, 22 Ohio C.C.R. 724 (1901).

position in what appears to be the current trend in Ohio case law and the case law of other states.

There is a similar current trend in the case law to void clauses in consumer goods purchase agreements which waive or cut off against an assignee of chattel paper defenses such as breach of warranty and failure to carry out service agreements.⁹⁶ Thus the sixth circuit Court of Appeals voided a broad waiver as being against public policy, relying not on applicable state law but on "the established law merchant."⁹⁷ The Code again, then, would merely codify a trend in judicial opinion which Ohio would probably recognize in any event.

These code provisions have been vigorously criticized on grounds of logic and policy,⁹⁸ but, as a practical matter, neither the negotiable note nor the waiver and cut-off clause is of much importance in financing consumer transactions. Field interviews have established that the larger finance companies as a rule either do not now use these provisions in their standard forms, or, if the standard forms do contain such provisions, the companies seldom try to invoke the rights which the Code, if adopted, would deny them. Typically the bank or finance company tries to get the assignor-dealer to make good on his promises to the consumer or else charges such losses to the dealer's "reserve," a fund withheld from the initial financing for various contingent charges.⁹⁹

We now turn to the transfer of chattel paper. Neither the present Ohio chattel mortgage statute nor the present Ohio conditional sales statute contains any provision covering the assignment of chattel paper,¹⁰⁰ and there is very little Ohio case law on the subject. It has been established that the rights of a chattel mortgagee can be transferred,¹⁰¹ that an assignment of chattel paper is not itself required to be filed or recorded,¹⁰² and that an assignee of a conditional sales contract is subject to the refund provisions of the conditional sales statute.¹⁰³

⁹⁶ Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 46 (1951).

⁹⁷ *Equipment Acceptance Corp. v. Arwood Can Mfg. Co.*, 117 F. 2d 442 (6th Cir. 1941).

⁹⁸ Kripke, *Chattel Paper as a Negotiable Specialty Under The Uniform Commercial Code*, 59 YALE L.J. 1209, 1214 ff. (1950).

⁹⁹ Kripke, *supra*, 1216; Note — *Negotiability of Conditional Sales Contracts*, 57 YALE L.J. 1414, 1418 (1948).

¹⁰⁰ Except that a chattel mortgage which has been recorded (because it covers land and chattels) may be assigned in the same manner as a real estate mortgage. OHIO GEN. CODE § 8563.

¹⁰¹ *Johnson v. Thayer*, 53 Ohio App. 25, 4 N.E. 2d 172 (1936); *Frey v. Mac-Wilson*, 39 Ohio App. 158, 177 N.E. 232 (1931).

¹⁰² *Nathan Rosenblum & Co. v. C. U. Hill & Co.*, 27 Ohio L. Abs. 403, 405 (7th Dist. App. Mahoning County 1938).

¹⁰³ *Yurcisin v. Commercial Credit Co.*, 67 Ohio App. 513 (1941).

There was no comprehensive treatment of the problem, however, until the 1951 Accounts Receivable Statute included in its definition of an account receivable any account evidenced by unfiled chattel mortgages and unfiled conditional sales agreements.¹⁰⁴ Thus chattel paper not of public record (which comprises the great majority of all chattel paper arising in the sale of consumer goods)¹⁰⁵ came under the notice filing requirements already discussed in this paper as the exclusive way in which a security interest could be perfected.¹⁰⁶ But the transfer of accounts evidenced by filed chattel mortgages and filed conditional sales agreements remains covered by only the fragmentary legal rules discussed above.

The Uniform Commercial Code establishes a comprehensive scheme for the assignment of all chattel paper. First of all, it recognizes that existing commercial practice is to transfer chattel paper by delivery of possession, but it also recognizes a security interest which can be perfected by filing without transfer of possession.¹⁰⁷ Thus the Code provides for the many assignors (especially those who do not notify their debtors of the assignment and who collect the installment proceeds) for whom it is not convenient to transfer the chattel paper, by providing that notice filing shall perfect a security interest in chattel paper left in the possession of the assignor. Such perfection, however, will not prevail against, a purchaser for new value who takes possession.¹⁰⁸ By stamping a notice of assignment on the chattel paper left in the possession of the assignor, the assignee can prevent a purchaser from gaining this preferred position since any purchaser would necessarily learn from such stamp that the chattel paper had been previously assigned, and U.C.C. Sec. 9-308 gives the purchaser for new value a preferred position only if he "does not have actual knowledge that the specific chattel paper is subject to a security interest." These provisions for perfection by possession come closer to existing commercial practice and expectation of legal result than does the present Ohio Statute as is shown by the fact that the Ohio statute's provisions governing unfiled chattel paper have thus far been largely ignored.

SUMMARY AND CONCLUSION

Account receivable and chattel paper financing has become, in terms of dollar volume and yet more in terms of number of

¹⁰⁴ OHIO GEN. CODE § 8509-3(1) (b) (3).

¹⁰⁵ Most small loan companies and credit stores regard the saving of the Recorder's fee as an ample reserve for the occasional loss due to dishonesty or bankruptcy of the individual borrower or customers. But cf. note *supra*.

¹⁰⁶ See OHIO GEN. CODE § 8509-4 and -6(1).

¹⁰⁷ U.C.C. § 9-305(1).

¹⁰⁸ U.C.C. § 9-308.

transactions, a major source of commercial and industrial borrowing.¹⁰⁹ Ohio was one of the first states to provide a legal framework for such financing and, except for filed chattel paper, it already has legislated a legal pattern which overall is about the same as the legal pattern in Article 9 of the Uniform Commercial Code. The Code's provisions covering security interests in accounts, contract rights, and chattel paper, however, (a) are integrated into the provisions covering security interests in documents, instruments, and goods, and (b) have been adopted by Pennsylvania and will be adopted by many other states. This uniformity between types of security interests and between the laws of the several states is of sufficient importance to justify substituting the Code for the present Ohio law.

On a policy level, the principal objection to Article 9 is that by facilitating current asset financing the legislature may discourage trade suppliers from offering generous credit terms. Since it is smaller businesses in particular which typically use trade credit from their suppliers as a primary source of outside capital,¹¹⁰ the objection is sometimes carried further to a statement that the modernization of chattel security law will aid banks, finance companies, and big business at the expense of small companies.

The Code's draftsmen are not economists enough to trace the ultimate economic impact of their proposals—indeed, one of the draftsmen has suggested that not even the professional economists are economists enough for that.¹¹¹ But extreme predictions of various forms of disaster were also made in 1941 when the pioneer Ohio Assignment of Accounts Receivable Statute was passed, and all that has actually happened is that lower cost financing has gradually become available to those companies which need credit and can offer accounts receivable as collateral. Compared to this accounts receivable financing now available, trade credit through the loss of cash discounts on purchases is very expensive financing.¹¹² Perhaps the economic cost of distribution will be less if it is financed by secured borrowing on inventory and accounts rather than by undiscounted invoices for purchases. In any event,

¹⁰⁹ An economic history of accounts receivable financing will be found in Saulnier & Jacobs, *Accounts Receivable Financing*, National Bureau of Economic Research (1943). The commercial and financial aspects, with case illustrations, are considered in Silbert, *Financing and Factoring Accounts Receivable*, 30 HARV. BUSINESS REV. 39 (1952).

¹¹⁰ Kripke, *Current Assets Financing As a Source of Long-Term Capital*, 36 MINN. L. REV. 506, 507 (1952).

¹¹¹ Gilmore, *The Secured Transactions Article of the Commercial Code*, 116 LAW & CONTEMP. PROB. 27 (1951).

¹¹² Losing a "2/10 net 30" cash discount means paying 2% for 20 days use of the money or a per annum interest rate of 36½%.

that economic puzzle is not an issue in evaluating Article 9, for we do not face the choice of permitting or forbidding borrowing on current assets. Our choice is whether such borrowing, which has grown enormously during the twentieth century and which is still growing, shall be carried on under the law of the twentieth century or under the law of the preceding century.

One might agree with all we have just said as to policy and still feel that the form and the substance of each section of Article 9 should be reviewed with an eye to tailoring the Article more closely to Ohio practices and precedents and, possibly, to improving on the style of the draftsmen. We have suggested that changes might be desirable in connection with the coverage of claims against the Federal Government and with the filing provisions. But Article 9 is an interrelated and complex statute; wholly unexpected consequences may ensue from seemingly minor changes in the key sections. Amendments to the Article, therefore, should be carefully drafted well in advance of the legislative session and should be reviewed by experts on the Code. Then every effort should be made to persuade the legislature to do no hasty tinkering.

Only for very good reasons should any change be made in the official text. Judge Goodrich, director of the American Law Institute, has pretty well stated the case for Article 9 in stating the case for the entire Code:

All matters contained in the Code will not be satisfactory to all as a matter of substance. Many matters expressed in text or commentary will not be satisfactory to some. After all, a man who can write, if he has any pride of authorship, likes his own form of expression best.

But we think that the Code itself represents the sum total of an immense amount of time and thought from a great many people well informed in both the business and the legal sides of the fields covered by the Code.

We hope it will perform a public service worthy of the effort which has gone into it.¹¹³

¹¹³ Foreword to Official Draft, Text and Comments Edition (1952)

